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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PAUL R. SMITH
Petitioner,

v.

CIBA-GEIGY CORPORATION, JOHN K. LIKES
AND JAMES M. HAYES,
Respondents

Petition For A Writ Of Certiorari to the United States Supreme Court Of Appeals for the Fifth Circuit

PETITIONER FOR WRIT OF CERTIORARI

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67 pp

Whether the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, imposes a duty on employers to enter into an interactive process to arrive at reasonable accommodations for their otherwise qualified disabled employees after being notified by the employee of the disability and whether the Fifth Circuit failed to apply this duty.

Parties to Proceeding

PETITIONER:

PAUL R. SMITH

RESPONDENTS:

CIBA-CEIGY CORPORATION, JOHN K. LIKES and JAMES M. HAYES

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, Paul R. Smith, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions and decisions of the Fifth Circuit Court of Appeals are unreported. These opinions and decisions are comprised of the Fifth Circuit's opinion on appeal, its granting of Petitioner's Motion to File Motion for Rehearing Out of Time, and the denial of Petitioner's Motion for Rehearing. These are attached and printed as Appendices A, B, D, and E. (App., *Infra*, 1a; 3a; 22a; 23a). The decision of the District Court granting summary judgment against Petitioner is attached and printed as appendix C. (App., *Infra*, 4a).

JURISDICTION

The Fifth Circuit Court of Appeals entered judgment on April 8, 1997. The Fifth Circuit granted Petitioner's Motion for Leave to File a Motion for Rehearing Out of Time on April 30, 1997. The court of appeals denied Petitioner's Motion for Rehearing on May 15, 1997. Petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1).

Jurisdiction is also proper pursuant to United States Supreme Court Rule 10 because the court of appeals decision conflicts with the decisions of the Seventh Circuit on the question presented, and because the Fifth Circuit, "has decided an important question of federal law that has not been, but should be, settled by this Court."

STATUTORY PROVISIONS INVOLVED

The American with Disabilities Act, 42 U.S.C. §§ 12101-12213 outlaws employment discrimination against disabled Americans. The pertinent provisions of the Act to this case, 42 U.S.C. §§ 12101-12117, attached and printed as Appendix F (App. *Infra*, 24a), specifically outlaws employment discrimination against disabled Americans who are otherwise qualified for their jobs.

STATEMENT OF THE FACTS

A. Course of Proceeding and Disposition in Courts Below

Petitioner, Paul R. Smith, suffered from Obsessive Compulsive Disorder ("OCD"). Respondents fired Smith because of his disability on December 15, 1992. Rather than attempt to accommodate Smith mental disability as required, respondents deliberately worsened Smith's disability and then fired him because of it. Based on this, Smith, a resident of Texas, brought suit against the Respondents in the District Court of Harris County, Texas, 157th Judicial District on May 5, 1994. Respondents removed the case to the United States District Court for the Southern District of Texas on July 13, 1994 pursuant to 28 U.S.C. § 1441 alleging the court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332. Respondents filed a motion for summary judgment which was granted by the District Court on May 23, 1996. The District Court entered its final judgment on the same day. Smith appealed the District Court's decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the District Court's entry of summary judgment against Smith on April 8, 1997. Upon the filing of a petition for rehearing by Smith, the Fifth Circuit again denied him the opportunity to present his case to a jury of his peers by denying the petition on May 15, 1997.

B. Smith and his Firing Due to his Disability, OCD

Paul Smith was a longtime, loyal, and valuable salesman for Ciba-Geigy. He was hired by the company on November 5, 1973. When he was fired because of his disability in December 1992, Smith had provided nineteen years of uninterrupted and valuable service to the company. Until December 1991, Smith was consistently rated an excellent employee and received employment evaluations rating him as "outstanding," "exceeding expectations," and "meeting expectations." Smith even saved the company from embezzlement of funds by his former supervisor. Despite Smith's reporting of the conduct in 1988, it was not until 1990 that the company finally acted. In 1990 the embezzling supervisor was finally replaced by James M. Hayes.

While initially acknowleding that Smith was a good salesman of the company's drugs, Hayes changed his mind in the last six months of 1991 after discovering that by putting pressure on Smith, Smith became troubled. After this discovery, Hayes continued to attack Smith in the very spot

Smith was most vulnerable because of his disability. Hayes refused to tolerate or accommodate Smith's disability. Instead, he exploited Smith's OCD to aid in his effort to be rid of an inconvenient employee. Although Smith had long suffered from his disability, it never interfered with his job performance until Hayes began to use it against him. On December 2, 1992, Smith sent Respondents a letter informing them of his disability and suggesting reasonable accommodations. Upon learning of Smith's disability, Respondents immediately fired him on December 15. Paul Smith was a husband and father to two teenage children. On May 4, 1997, Paul Smith killed himself with a shotgun blast to the head because he felt he could no longer provide for his family.

(i) Smith's Disability

Smith suffered from OCD since at least the early 1980's. (R. 1226, back of 1226, p.16; Supp. R. 10). OCD is a psychiatric anxiety disorder recognized by the American Psychiatric Association which causes extreme anxiety, distress, compulsion and obsession to detail. These compulsions and obsessions can cause marked distress, are time consuming, and can significantly interfere with a person's normal routine or occupational functioning. The indicative factors include perfectionism, which interferes with task completion, and a preoccupation with details, rules, lists, order, organization, or schedules to the extent that the major point of the activity is lost. The person has difficulty completing paperwork on time because of rumination about priorities. (R. 316-315). This fear is capable of paralyzing a victim of OCD. (R. 1277, back of 1277, p. 88). The Equal Employment Opportunities Commission has expressly recognized OCD as a disability. *EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act* 59 DLR E-1, 1997.

Smith's OCD, substantially limited his ability to do the manual task of paperwork. (Supp. R. 121, 20; 11, back of 11, pp. 86-88). Smith also exhibited obsessive worry about completing tasks, ordering, and numbering. (Supp. R. 12; Supp. R. 12, back of 12, p.88). Some of the symptoms of Smith's displayed were, "checking and rechecking paperwork, reading and rereading questions, documenting. . .obsessive worrying." (R. 1225).

> Most of [Smith's] symptoms have to do with writing or reading and documenting things, list making, ordering, symmetry, laying things on the table in just the right

> manner, having the right pen, having counted everything ahead of time, made a list of everything he needs to do and then worrying about each step along the line of the list, filling out form--filling out a form would take him a long time because he worries about each question, reads, rereads it, writes his answer, then goes back and rewrites his answer. It may take him an hour to do a three- or four-sentence letter." (R. 1225).

Smith's disability created, "the fear of not getting [paperwork] completed correctly, accurately in the way his boss wanted." (Supp. R. 12, back of 12, pp. 85-86). The continuous and increasing pressure placed on him by Respondents did nothing but cause his OCD to worsen. (Supp. R. 129; 12, back of 12, p. 88). "Every time [Respondents] did something like put him on probation or give him a negative response, it made him more--have more anxiety and load his paperwork down." (Supp. R. 17). These problems both caused Smith's firing were exacerbated by the performance improvement plan and probation imposed on Smith by Respondents. (Supp. R. 179, 19).

(ii). Smith Succeeded in his Job Despite His Disability

Smith's disability did not affect his ability to perform the essential part of his job, making sales. Respondents admit that Smith had no problem with this. Smith was capable of and did a good job selling defendants' products. He performed at least as well as the other salespersons who were not fired. (R. 1235; 1237). Smith' disability did not prevent him from driving to sales appointments, talking on the telephone, meeting with physicians, or making sales presentations to physicians. (R. 1225, back of 1225, p 23).

Smith was historically a successful employee. Initially, Hayes agreed. In the July 1990 evaluation Hayes noted that Smith submitted his reports on time, and with the exception of one area related directly to sales technique, Smith was rated outstanding, exceeding expectations, and meeting expectations. (Supp. R. 65).

Smith's December 1990 evaluation was nearly identical that of July 1990. Again his weekly reports and peer promotion reports were submitted timely and accurately. (Supp. R. 63). Hayes next evaluation of Smith continued the trend of the last two. Overall, Smith's performance

was good. Smith's reports were accurate. However, the evaluation did reflect troubles caused by Smith's disability because some peer promotion reports, while accurate were not delivered on time according to Hayes. (Supp. R. 58). Even so, the only area Smith needed to improve was leaving VMX (voicemail) messages on his call plan implementation. Hayes did not criticize Smith's ability to execute the call plan or to promote Ciba's product, only Smith's reporting of it. (Supp. R. 59). The only area Smith was rated "below expectations" in the evaluation was sales. (Supp. R. 59). However, during this period all Respondents' sales representatives in the Tyler, Texas district had similar trends. (Supp. R. 189).

The evaluations demonstrate that Hayes regarded Smith as a good employee through the first half of 1991. (Supp. R. 66-65; 64-63; 60-55). Unknown to Smith, despite the fact that he received good performance reviews, Hayes and Likes were already targeting him in an effort to justify their discrimination against him. (R. 1107-02; 1100; Supp. R. 1061-62).

(iii.) Unbeknownst to Smith, Respondents Decided to Force Him Out

Smith was a conscientious employee. Unfortunately, Smith's conscientiousness got him into trouble. Smith's problems with Respondents started in 1988 when his boss asked him to help him embezzle money from Ciba-Giegy. Smith refused and reported the request to his boss's boss. (R. 1237; Supp. R. 116-15, 92,68). Even though Smith's report was accurate, he was criticized for reporting on his boss. (Supp. R. 71, 68). Smith's name became known as a "problem." (Supp. R. 127, back of 127, pp. 109-111; Supp. R. 71-69; 68-67; R. 231, 1237). When Hayes replaced the embezzler, it did not take him long to try to remedy this "problem" for the company.

The beginning of Respondents' concerted effort to be rid of Smith coincided with Dr. Lynn Morrow's confirmation of, and institution of treatment for Smith's OCD in October, 1991. (R. 1217; R. 1216, back of 1216, pp. 79-80; 1277; back of 1277, pp. 79-80). It also coincided with Jack Likes participation in Smith's evaluations as the new regional director for Ciba-Geigy's southwest region. (Supp. R. 156, back of 156, p. 39;Supp. R. 54-59).

As a result of a non-favorable December 1991 evaluation, Smith's success during the first half of the year was ignored and he was denied a

merit raise for 1992. (Supp. R. 45). The same things once recognized as successes by Hayes were now deemed failures. For example, while Smith met his goal in the area of implementation of promotional programs, Hayes recorded it as a failure because he felt Smith's expenses were too high. (Supp. R. 52). Additionally, while Smith continued to be successful in his sales, Hayes recorded it as a failure because most of the doctors were customers anyway.

As a result of Smith's purported decline, he was placed on a performance improvement plan ("PIP") by Respondents in January 1992. (Supp. R. 44-38). From this period until Smith was ultimately fired, he received criticism and pressure. Smith's PIP was guaranteed and designed to result in worsening his OCD and lead to the next step in discipline, probation. The only thing the PIP was guaranteed not to do was improve Smith's performance. This is precisely what occurred. Smith's doctor ordered him to take almost two weeks off in January 1992 because of his disability. Smith's doctor notified Respondents that Smith was suffering, "anxiety-depression, panic attacks . . . pt. has been under pressure from employer, management applying pressure etc." (Supp. R. 4; 37; 4, back of 4, p. 451). Each of these are classic symptoms of OCD and clearly indicate that the Respondents actions were already taking their toll. (Supp. R. 4, back of 4, p. 32). Moreover, Ciba knew these were classic symptoms of OCD. Ciba manufactured the most popular medication for treatments of OCD, Anafranil (Supp. R. 180; 152; R. 1120).

Respondents decided by May 26, 1992 that Smith to put Smith on probation in July even thought the PIP did not end until July. (R. 1143). In fact, even improvement would have proved futile because as early as May 1992 Respondents told Smith of his "impending termination." (Supp. R. 62-61). Respondents were simply going through the motions in their effort to justify firing Smith. Respondents placed Smith on probation on July 15, 1992. (Supp. R. 31-24). This placed further pressure on Smith and further exacerbated his disability. Smith was told to improve or be fired. (Supp. R. 29). Throughout this period additional deadlines and pressure were put on Smith.

In October, 1992 Smith, at the suggestion of defendants, was scheduled to meet with a person he was led to believe was a counselor from the Employment Assistance Program ("EAP"), Louis Grumet. (Supp. R. 145, back of 145, pp. 247-248; Supp. R. 91; 18). As it turned out Grumet was not a counselor, psychologist, or psychiatrist, but instead

was the manager of human resources for the defendants and was not associated in any way with the employee assistance program. (Supp. R. 154, back of 154, p. 95; R. 1163; 1149). In fact, Grumet was involved in Defendants' oppression and termination of Smith from the very beginning. (Supp. R. 45). As a result of this "counseling session" defendants relieved one limited area of paperwork. (Supp. R. 198). However, this addressed neither the remaining harassment and pressure Respondents directed towards Smith, nor aided Smith in addressing the basic problems caused by his disability.

(iv.) When Smith Told Respondents of his Disability, They Immediately Fired Him

Smith attempted to deal with his disability personally. He was reluctant to tell his employer of his disability because of embarrassment and fear. (Supp. R. 18; 18, back of 18, pp. 37-39). Finally, in a futile attempt to save his job and family, he was forced to admit to Respondents that he had a psychological disability. On December 2, 1992 Smith sent a letter to defendants stating, "You know the more pressure you push on me the more overwhelmed I become. I have OCD, and I would appreciate your help and understanding in this matter." (Supp. R. 129; R. 930). The letter contained several suggestions of reasonable accommodations. Among these was a course in time management or actual help from the employee assistance program rather than a meeting with one of the people responsible for firing him, Grumet. (R. 930). Smith wrote that his OCD impacted his ability to do paperwork and that he needed help. (R. 930). Defendants admit receiving the expense reports but deny receiving the letter.

Smith's fears of more cruel treatment from Respondents was proved correct. Despite asking for "help and understanding" Respondents panicked and immediately fired him. (Supp. R. 88, back of 88, p. 437; Supp. R. 24). Respondents did not even have the courtesy to fire him respectfully. Instead, after receiving the letter, they told Smith to fly to New Orleans for an "evaluation" on December 15, 1992. Hayes and Likes then failed to meet Smith and forced him to wander the airport searching for them. Once Smith located them, Hayes and Likes simply handed him a letter dated December 15, 1992 stating, "[T]his letter is to inform you of your termination of employment, effective December 15, 1992 . . .," and sent Smith back home. (Supp. R. 140, back of 140, p. 24; Supp. R. 78, back of 78, p. 39; Supp. R. 161; R. 1241).

(v.) Smith was Capable of Performing his Job with Reasonable Accommodation

Even Respondents admit that Smith was capable of and qualified to perform his job as a salesman. (Supp. R. 154, back of 154, dep. p. 95; R. 1237, 1245). Smith's doctor, Dr. Lynn Morrow stated that Smith was fully capable of performing his job if Respondents had been willing to reasonably accommodate his disability. Smith himself demonstrated his ability to perform the job by successfully performing it for nineteen years. (R. 1233, 1232; Supp. R. 17, 10). Furthermore, Smith was never "totally disabled" as Respondents allege. While Smith was clearly having a difficult time due to his disability, Dr. Morrow states that she was wrong about the extent of his disability. (Supp. R. 16, back of 16, p. 65). Even so, this assessment was made two months prior to Smith's termination and can not be construed as a judgement that Smith could not do his job. ***D'April v. Fleet Servs. Corp.***, 92 F.3d 1, 4 (1st Cir. 1996); ***Overton v. Reilly***, 977 F.2d 1190, 1196 (7th Cir. 1992). In any event, Smith presented facts which, "viewed in the light most favorable to him, present[ed] a genuine issue of material fact as to whether he could have performed the essential functions of the job had [Respondents] accommodated him." ***Bultemeyer v. Fort Wayne Community Schools***, 100 F.3d 1281, 1285 (7th Cir. 1996).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit refused to recognize Respondents' duty to enter into an interactive process in an attempt to accommodate a disabled employee who is otherwise qualified. ***Bultemeyer***, 100 F.3d at 1281. The Fifth Circuit also improperly adopted the District Court's use of the traditional ***McDonald Douglass Corp. v. Green***, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) burden shifting test. (App. C, *Infra*, 4a). By so doing, the Fifth Circuit ruling directly conflicts with Seventh Circuit rulings that this duty exists and that the burden shifting test is not used when direct evidence of the breach of this duty is present. ***Bultemeyer***, 100 F.3d 1281, 1283 (7th Cir. 1996).

The holding also is in error and presents an important issue of federal law because the holding conflicts with the Fifth Circuit's own ruling in ***Feliburty v. Kemper Corp.***, 98 F.3d 274, 276 (5th Cir. 1996)("The determination of a reasonable accommodation is a cooperative

process in which both the employer and the employee must make reasonable efforts and exercise good faith. . . . [T]he employer is never completely free from some measure of responsibility.") and ***Taylor v. Principal Fin. Group, Inc.***, 93 F.3d 155, 163 (5th Cir. 1996)(issue presented was whether the appellant presented evidence that the appellee violated the ADA by not making reasonable accommodations to a known physical or mental disability). By doing so, the Fifth Circuit effectively negates the protections of the ADA for disabled employees within its jurisdiction.

I. The Court of Appeals' Interpretation of the Americans with Disabilities Act is in Conflict With the Interpretation Given the Act by the Seventh Circuit and Leads to a Situation among the Circuits in which the Protections of the Americans with Disabilities Act are Determined not by the Act, but by Geography.

The Americans with Disabilities Act states:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

The Act continues by stating that "discrimination" means:

> Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business on such covered entity. 42 U.S.C. § 12112(b)(5)(a).

The Seventh Circuit has expressly and repeatedly recognized the employer's duty to enter into an interactive process in an attempt to arrive at reasonable accommodation for an otherwise qualified disabled employee. ***Best v. Shell Oil Co.***, 107 F.3d 544 (7th Cir. 1997); ***Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago***, 104 F.3d 1004

(7th Cir. 1997); ***Bultemeyer***, 100 F.3d at 1281; ***Beck v. University Bd. of Regents***, 75 F.3d 1130, 1134 (7th Cir. 1996).[1] The EEOC recognizes this duty as well. 29 C.F.R. § 1630.9(a)(1996). Further, the EEOC notes "Where, [an] individual's functional limitation impedes such job performance, an employer must take steps to reasonably accommodate, and thus help overcome the particular impediment, unless to do so would present an undue hardship." 29 C.F.R. § 1630.1-.16 App. (1996). Failure to do so results in liability. ***Bultemeyer***, 100 F.3d at 1281.

Furthermore, the Fifth Circuit's holding conflicts with the Seventh Circuit's rulings on the issue of whether the employer must share in the effort to arrive at reasonable accommodations. The Seventh Circuit notes that, particularly in the case of mental disabilities, an interactive process is required between the employee and the employer in an attempt to arrive at some accommodation.

> . . .[P]roperly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say "I want a reasonable accommodation," particularly when the employee has a mental illness. The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help. ***Bultemeyer***, 10 F.3d at 1258.[2]

Respondents fired Smith within days of being informed of his disability through his December 2, 1992 letter. Moreover, as the Seventh Circuit recognized, "[i]f the precise meaning of [Smith's] letter was unclear, [Respondents] could have spoken with either [Smith] or [his doctor]. ***Bultemeyer***, 100 F.3d at 1284. Respondents chose not to. As noted *supra*, the Equal Employment Opportunities Commission requires the same of employers faced with a disabled employee. 29 C.F.R. § 1630.1-

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[1] At least two other Circuits recognize this duty. *See* ***Morisky v. Broward County***, 80 F.3d 445, 447 (11th Cir. 1995) and ***Lyons v. Legal Aid Soc.***, 68 F.3d 1512, 1515 (2nd Cir. 1995).

[2] While the Fifth Circuit seemed to adopt a similar requirement in ***Feliburty***, 98 F.3d at 276, it retreated from that holding in this case.

.16 App. (1996); *Also see EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act* 59 DLR E-1 at 14, 1997("Supervisors play a central role in achieving effective reasonable accommodations."). Rather than attempt to explore accommodation for Smith, as required by the ADA, so that Smith could continue to perform his job, Respondents simply fired him. The Fifth Circuit ignored these facts and the fact that this is discrimination. By ignoring this duty the Fifth Circuit's decision conflicts with the Seventh Circuit's holding that the ADA requires an employer to enter into an interactive process in attempt to reasonably accommodate an otherwise qualified disabled employee. ***Bultemeyer***, 100 F. 3d 1283.

The Fifth Circuit's decision also conflicts with this Court's and the Seventh Circuit's holdings that the presentation of direct evidence of discrimination negates the use of the ***McDonald-Douglass*** burden shifting test. ***Trans World Airlines, Inc. v. Thurston***, 469 U.S. 111, 121, 105 S.Ct. 613, 621-22, 83 L.Ed.2d 523 (1984); ***Bultemeyer***, 100 F.3d at 1283. The prima facie burden shifting analysis plays no part in this case. The Fifth Circuit's holding that Smith was not treated differently than other employees is irrelevant to a determination of his case. This is not a disparate treatment case, rather it is a failure to accommodate case. The Fifth Circuit's holding results in affirming a summary judgment for a reason which is irrelevant to the case. This is exactly the point the Seventh Circuit made when it disregarded the lower court's use of the burden shifting approach in ***Bultemeyer***. ***Bultemeyer***, 100 F.3d at 1282.

II. The Issues Presented by this Case are Important and Should be Settled by this Court Because the Fifth Circuits' Ruling Operates to Remove the Protections of the Americans with Disabilities Act for Disabled Employees

The Fifth Circuit not only ignores its own holdings, but it makes it impossible for disabled employees, such as Smith, to be protected by the ADA, a law with that very purpose as its genesis.

> The Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunities

> for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity. 42 U.S.C. § 12101(a)(8)(9).

President George Bush echoed this on signing the ADA into law when he stated:

> It is altogether fitting that the American people have once again given clear expression to our most basic ideals of freedom and equality. The Americans with Disabilities Act represents the full flowering of our democratic principles. . . The Americans with Disabilities Act presents us with an historic opportunity. It signals the end of the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. Statement of President Bush upon signing the Americans with Disabilities Act, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990).

The Fifth Circuit appeared to recognize the existence of the duty to reasonably accommodate the known disabilities of an otherwise qualified employee in ***Taylor***, 93 F.3d at 163. However, in the case at bar, the Fifth Circuit denies the existence of the duty by refusing to apply it and effectively negated it via the operation of its ruling. In ***Taylor***, the Fifth Circuit held that the disabled employee must both inform the employer of a disability, and suggest reasonable accommodations. ***Taylor***, 93 F.3d at 165-66. Under its ruling in this case, the Fifth Circuit allows the employer to immediately fire the disabled employee before the required cooperative process can begin in pursuit of accommodations even upon learning of the disability. This rewards quick acting employers and negates the protections for disabled Americans embodied by the ADA. Thus, employers can discriminate freely and escape liability because the employee never suggested any accommodation as they were fired before they were had the opportunity.

Smith was fired days after telling Respondents of his disability, well before he had the opportunity to sit down with Respondents and his doctor in an attempt to arrive at reasonable accommodation as suggested by ***Taylor***, 93 F.3d at 165. In fact, by refusing to recognize the duty and by requiring Smith to immediately inform Respondents of acceptable

reasonable accommodations, the Fifth Circuit again retreats from a previous ruling. As noted *supra*, in ***Feliburty***, 98 F.3d at 276 the court stated that a cooperative process is required in arriving at reasonable accommodation. Despite this, in this case the Fifth Circuit required clairvoyance, quick action, and legal acumen from Smith. Because Smith did not present a fully prepared and acceptable plan for reasonable accommodation when notifying Respondents of his disability he was left unprotected by the ADA.

The Fifth Circuit retreated from another of its prior rulings in denying Smith's appeal. In ***Riel v. Electronic Data Sys.***, 99 F.3d 678, 681 (5th Cir. 1996) the Fifth Circuit recognized that, ". . . an employer who treats a disabled employee the same as a non-disabled employee may violate the ADA. By requiring reasonable accommodations, the ADA shifts away from similar treatment [as is required under other discrimination statutes] to different treatment of the disabled by accommodating their disabilities." ***Riel***, 99 F.3d at 681. Despite this, the Fifth Circuit disposed of Smith on the grounds that he was not treated differently than other employees. Then, the Court refused to address the fact that Respondents fired Smith rather than attempt to undertake the different treatment the ADA requires for disabled employees. Thus, the Fifth Circuit used the similar treatment Smith received from Respondents in their effort to get rid of him as a reason to deny him the different treatment the ADA requires. Smith was presented with a no win situation and the Fifth Circuit condones it.

The Fifth Circuit continued its practice of ignoring itself in addressing Smith's case by adopting and applying the lower court's use of the ***McDonald Douglass*** burden shifting test. The Fifth Circuit recognized the burden shifting test plays no part in a direct evidence case in ***Portis v. First Nat'l Bank of New Albany***, 34 F. 3d 325, 328 (5th Cir. 1994), *citing* ***Trans World Airlines***, 469 U.S. at 121, 105 S.Ct. at 621-22, 83 L.Ed.2d 523. Despite this, the Fifth Circuit applied the ***McDonald Douglass*** test in this case to find Smith was not treated differently than other employees even though that is irrelevant to Smith's case.

The duty imposed by the ADA is an important issue of federal law. It was designed to protect disabled employees in the exact position Smith found himself in. His disability was seriously effecting his employment. Despite the social stigma long associated with mental disability, Smith

finally found the courage to ask for help from the same people who were inflicting pain on him. Despite this, Respondents showed no compassion. Instead, they hurriedly rid themselves of a person who had become an inconvenient employee. The Fifth Circuit is clearly in error in this case. The Fifth Circuit turned a blind eye to Smith and the mandate of Congress and the American people in its refusal to uphold the ADA.[3]

CONCLUSION

Because the decision in this case creates a conflict among the circuits and because the Fifth Circuit has effectively negated the important protections of the ADA for disabled Americans such as Paul Smith by allowing Respondents to immediately fire Smith rather than enter into an interactive process in an attempt arrive at reasonable accommodations, this petition for certiorari should be granted.

Respectfully submitted,

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[3] The Fifth Circuit appears to have issued twenty opinions under the ADA. Of those, only three have been favorable to the plaintiff. ***Johnson v. Gambrius Co./Spoetzel Brewery***, 109 F.3d 1040 (5th Cir. 1997), ***Riel***, 99 F.3d at 678, and ***Rizzo v. Children's World Learing Ctr.***, 84 F.3d 758 (5th Cir. 1996).

APPENDIX A

FILED
U.S. COURT OF APPEALS
APR 08 1997
CHARLES R. FULBRUGE III CLERK

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-20609

PAUL R. SMITH,

Plaintiff-Appellant,

versus

CIBA-GEIGY CORPORATION; JOHN K. LIKES; and JAMES M. HAYES,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(H-94-CV-2381)

Before REAVLEY, JOLLY, and BENEVIDES, Circuit Judges.
PER CURIAM:*

*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Appellant, Paul R. Smith, appeals from the summary judgment dismissal of his employment discrimination claim brought pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, and his state tort claim for intentional infliction of emotional distress. After a *de novo* review of the summary judgment evidence and pleadings, and consideration of the appellate briefs and argument presented on appeal, we affirm the judgment of the district court. Smith has fallen far short of establishing a genuine issue of material fact on his state law tort claim, and the summary judgment proof with respect to his ADA claim is likewise insufficient. Considering the evidence in the light most favorable to Smith, he has not shown that he was qualified for his former position as a sales representative for the appellee corporation, nor that he was treated less favorably than non-disabled employees. We affirm for essentially the reasons set forth by the district court in its order of May 23, 1996, granting summary judgment.

AFFIRMED.

APPENDIX B

ENTERED
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MAY 23 1996
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAUL R. SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. H-94-2381**
CIBA-GEIGY CORPORATION,	§	
et at,	§	
Defendants.	§	

FINAL JUDGMENT

For the reasons stated in the Order signed today, the Court finds that the motion for summary judgment filed by Defendants Ciba-Geigy Corporation, John, K. Likes and James M. Hayes is GRANTED and the case is DISMISSED. Plaintiff Paul R. Smith shall take nothing from Defendants. Because Defendants have prevailed in this action costs are to be borne by Plaintiff Paul R. Smith. *See* FED. R. Civ. P. 54(d).

So ORDERED.
THIS IS A FINAL JUDGMENT.
The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 22nd day of May, 1996.
*/s/*John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

ENTERED
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MAY 23 1996
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAUL R. SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. H-94-2381**
CIBA-GEIGY CORPORATION,	§	
et at,	§	
Defendants.	§	

ORDER

Pending before the Court is the motion for summary judgment filed by defendants Ciba-Geigy Corporation ("Ciba"), John K. Likes and James M. Hayes (together, the "individual defendants").[1] The Court has reviewed the motion, response, the additional papers filed in this case, and the applicable law, and is of the opinion the motion (docket (#22) should be GRANTED.

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1. For convenience, the Court shall refer to all Defendants collectively as "Ciba," except where the arguments of the individual Defendants must be separately addressed.

Background

Plaintiff Paul R. Smith ("Smith") was forty five years old when he was terminated from his position as a sales representative for Ciba. At the time, he was suffering from Obsessive Compulsive Disorder (OCD), a psychiatric anxiety disorder which can significantly interfere with a person's ability to function normally.

Ciba fired Smith on December 15, 1992, after he had spent nineteen years with the company. He had been a sales rep in the Tyler, Texas territory, which reported to the New Orleans District, falling within the Southwest Region headquartered in Dallas. Hayes was Smith's district manager, Likes his regional director. Smith's job as a sales rep entailed marketing Ciba's products to physicians in his territory, providing product samples to physicians, and conducting product presentations. Along with these marketing functions, Smith was required to prepare expense reports related to his job, inventories and physician signature forms related to sample products, and weekly reports of his activities. These documents are required by Ciba to supervise sales reps, who by the nature of the job function without direct personal supervision. These administrative tasks were a part of Smith's job as a Ciba sales rep.

Beginning in 1990 or 1991, the record shows that Smith was not properly submitting physician signature forms or accounting for all expenses. Hayes made several attempts to inform Smith of the deficiencies and that they needed to be corrected, but the problem began to escalate. In July 1991, Likes and Hayes held a meeting with Smith, and offered him an opportunity to discuss any problems that may have contributed to his declining performance. Smith indicated that an organizational change, which had moved Smith's territory from the Dallas to the New Orleans district, was the only thing that may have affected his performance.

After the meeting, Smith's performance continued to deteriorate. Smith was placed on a performance improvement plan in January 1992. He did not complete the plan, and in July 1992, Likes and Hayes

again met with Smith, this time placing him on probation. Smith still had revealed no reason for the decline in his performance. Even after he was placed on probation, Smith failed to perform the administrative tasks required of all sales reps, and further failed to complete an additional weekly report required of him during the probationary period.

In October 1992, Ciba's human resources manager, Lois Grumet, met with Smith to determine whether his performance could be improved. At the meeting, Smith stated that he had no personal problems; his only explanation for his declining performance was that Hayes was placing too much pressure on him to improve. After the meeting, Smith agreed that it would be fair to judge his performance if the additional weekly report were no longer required of him, so that he would only do the essential paper required of every other representative. Ciba made this change.

Nevertheless, his performance did not improve. In fact, the record shows that he failed to send any reports dating after the October meeting. Hayes and Likes called Smith to a meeting in New Orleans, where they fired him.

Smith had been under psychiatric care for OCD since October of 1991. However, he did not inform Ciba of this condition until, at the earliest, December 4, 1992. In a letter to Hayes, Smith complained that he was overwhelmed with paperwork, that he was receiving too much pressure from Hayes, and that "I have OCD, and I would appreciate your help and understanding in this matter." Smith depo. exh. 1. This is the only reference to OCD Smith acknowledges making to Ciba.

Smith filed his original petition in the 157th District Court of Harris County, Texas, and Ciba removed on the basis of diversity and federal question jurisdiction. Smith's original petition states four causes of action against all defendants; Intentional Infliction of Emotional Distress ("HED"), Age Discrimination, Disability Discrimination, and Breach of Contract.

Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. A fact is material if its resolution in favor of one party might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A genuine issue of material fact exists if there is a genuine issue for trial that must be decided by the trier of fact. In other words, summary judgment would not be granted if the evidence indicates that a reasonable fact-finder could find in favor of the nonmoving party. *Id. See also Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

In ruling on a Motion for Summary Judgment, the Court must accept the evidence of the nonmoving party and draw all justifiable inferences in his favor. Credibility determinations, weighing of the evidence, and the drawing of reasonable inferences are left to the trier of fact. *Anderson,* 477 U.S. at 255, 106 S.Ct. at 2513-14.

Under Fed. R. Civ. P. 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once this burden is met, the burden shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita,* 475 U.S. at 585-87, 106 S.CT. at 1355-56.

Where the moving party has met its Rule 56(c) burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . [T]he nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.' Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no *genuine issue for trial." Matsushita,* 475 U.S. at 586-87, 106 S.Ct. at 1356 (quoting

Fed. R. Civ. P. 56(e) (emphasis in original).

Analysis

The Defendants move for summary judgment on all causes of action raised by Smith in his complaint. The Court addresses each cause of action in the order it appears in the complaint.

Intentional Infliction of Emotional Distress

Ciba argues that Smith's claim for IIED must fail because he can show no evidence of "extreme and outrageous" conduct. "To recover for intentional infliction of emotional distress, a plaintiff must prove that . . . the defendant's conduct was extreme and outrageous . . ." *Randall's Food Markets, Inc. v. Johnson,* 891 S.W.2d 640, 644 (Tex. 1995).

Smith claims that the examples shown in Ciba's brief are "unquestionably extreme and outrageous." He argues that "perhaps the most brutal action the Defendants took was in the manner they fired Smith." He complains that the individual defendants called him to a meeting in New Orleans, handed him a letter and fired him. Smith claims that he "was fired 10 days before Christmas, in an airport, in another city, for illegal reasons. This alone is outrageous and extreme treatment." The Court disagrees.

> Liability under [IIED] is imposed only "where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Wornich Co. v. Casas,* 856 S.W.2d 732, 734 (Tex.1993) (quoting RESTATEMENT (SECOND) OF TORTS § 45 cmt. d. (1965)). The cause of action does not protect against mere insults, indignities, and threats. *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 33 (5th Cir.1992). In the employment context, a claim for intentional infliction of emotional distress will

> not be supported by the broad range of conduct labeled as "mere employment disputes." *Johnson,* 965 F.2d at 33.

MacArthur v. University of Texas Health Ctr. at Tyler, 45 F.3d 890, 898 (5th Cir. 1995). The *MacArthur* court cited two cases which were "instructive as to the type of conduct that rises to the level of 'extreme and outrageous' in the employment context." In the first case, the plaintiff offered evidence that her employer intentionally made her appear to be a thief, and placed her in fear of being criminally charged. *Id.* (citing *Dean v. Ford Motor Credit Co.,* 885 F.2d 300, 307 (5th Cir. 1989)). The court also cited a case in which the defendants attempted to totally humiliate the plaintiff, who had served as a company executive for thirty years, by making him perform janitorial services and clean up after lower level employees. *Id.* (citing *Wilson v. Monarch Paper Co.,* 939 F.2d 1138, 1144-45 (5th Cir. 1991)). When taken in context, the conduct of which Smith complains does not rise to the level presented in *Dean* and *Wilson.*

Smith argues that the conduct he alleges "demonstrate[s] a severe and vicious pattern of actions taken by the Defendants *against a person with a disability* . . . To claim that driving someone to madness is not 'outrageous' perverts the very word." Resp. to Mot. for SJ (docket #27 at ¶59 (emphasis added). The Court might be persuaded that when a person is known to have a psychiatric disability, it may be considered "extreme and outrageous" to take actions with the conscious intent to aggravate the disability. But in this case Smith has presented no evidence that Ciba or its employees knew that he suffered from OCD prior to December 4, 1992. Almost all of the conduct of which he complains took place before Ciba had reason to know of Smith's condition. This Court is not willing to entertain the notion that Ciba harassed Smith "on account of his disability," when there is no evidence that anyone within the company knew he had a disability.

In *Johnson,* the Fifth Circuit addressed a factual situation very similar to that before this Court. In that case, a pharmaceutical salesman was being harassed by his district manager. Johnson complained that the district manager was extremely hostile, constantly criticizing

him and threatening him with termination. *Johnson*, 965 F.2d at 32. The manager continuously realigned Johnson's sales territory, assigning him less lucrative areas, and even removed a sales credit from his records. *Id.* at 33. Johnson began to suffer from psychiatric problems but, unlike in this case, he informed his employer. While he was on sick leave for his disability, Johnson was brought in for a meeting "to discuss his future," but was instead "promptly fired." *Id.* The Court held that

> [m]ost of the acts complained of by Johnson "fall within the realm of an ordinary employment dispute." *Wilson.* In order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees. Not all of these processes are pleasant for the employee. Neither is termination. However, there is no indication that Johnson is anything other than an at-will employee. An employer will not be held liable for exercising its legal right to terminate an employee, "even though he is well aware that such [action] is certain to cause emotional distress." *Diamond Shamrock Ref. and Mktg. Co. v. Mendez*, 809 S.W.2d 514, 522 (Tex. App.--San Antonio 1991, writ granted on other grounds). Merrell Dow was within its rights to terminate Johnson, *even though he was suffering from psychiatric disability.*

Id. at 34 (emphasis added).

When the evidence is viewed in the light most favorable to Smith, there is no reason why Ciba would have known that he had OCD prior to December 2, 1992. Viewed in that context, all of the conduct that took place before that date appears related to an "employment dispute," and therefore does not rise to the level of "extreme and outrageous" conduct. *See MacArthur*, 45 F.3d at 898. Therefore, Smith has not raised a genuine issue of material fact, and Ciba is entitled to judgment as a matter of law on his IIED claim.

Age Discrimination

A. Burdens of Proof

The evidentiary procedure in discrimination cases is governed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), as clarified by *St. Mary's Honor Ctr. v. Hicks*, ____U.S.____, 113 S.Ct. 2742 (1993). Although those decisions involved race discrimination under Title VII, the Fifth Circuit has adopted this procedure in ADEA cases. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 655, 957 n.4 (5th Cir. 1993). A three-step analysis applies to determine whether summary judgment is appropriate in an age discrimination case:

> In the first step, the plaintiff must prove a prima facie case by demonstrating that he or she was (1) discharged; (2) qualified for the position; (3) within the protected age class —over 40—at the time of discharge; and (4) replaced by someone outside of the protected age class—under 40-or was otherwise discharged because of his or her age.
>
> By proving a prima facie case, the employee establishes a rebuttable presumption that the employer unlawfully discriminated against the employee. The employer may then negate this presumption by articulating a legitimate, non-discriminatory reason for its action. If the employer articulates such a reason, and on summary judgment produces sufficient evidence to support the reason thus articulated, "The burden reverts to the plaintiff to prove that the employer's reason[is] pretextual."

Moore v. Eli Lilly & Co., 990 F.2d 812, 815 (5th Cir.), *cert. denied*,____

U.S. at ____, 114 S.Ct. at 467 (1993) (citations omitted).[2]

Ciba first argues that Smith cannot establish a prima facie case because he was not qualified for the position when he was terminated. Ciba points to the voluminous evidence it has produced in support of the propositions that Smith was totally disabled, and that he had exhibited an unwillingness or inability to do the job. Smith responds by suggesting that ti was his disability, combined with Ciba's failure to reasonably accommodate him, that prevented him from doing his job. The Court need not address this issue, and assumes without deciding that Smith can establish a prima facie case of age discrimination.

B. Ciba's Burden

Assuming Smith establishes a prima facie case, Ciba must articulate a legitimate, non-discriminatory reason for terminating Smith. *Bodenheimer,* 5 F.3d at 957. "An employer meets its burden of production . . . by proffering admissible evidence of an explanation that would be legally sufficient to justify a judgment for the employer." *Id.* To meet this burden, Ciba must set forth "reasons for its actions which, *if believed by the trier of fact,* would support a finding that unlawful discrimination was not the cause of the employment action." *Hicks,* ____U.S. at ____, 113 S.Ct. at 2747 (emphasis in original).

Ciba has presented ample evidence that Smith's performance of duties required by the company gradually deteriorated to the point where he was unwilling or unable to complete them. In fact, there is evidence that Smith completely failed, during a probationary period,

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2. The final holding in *Moore* regarding the shifting burdens was that the plaintiff can show pretext by proving *either* that the defendant's act was motivated by discrimination *or* by showing the proffered reason not to be credible. *Id.* However, this position has been overruled: "[A] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Hicks,* ____U.S. at ____, 113 S.Ct. at 2752 (emphasis in original). *See Bodenheimer,* 5 F.3d at 957 (citing *Hicks* in the ADEA context).

to fill out any reports required of any sales manager in his position. There is evidence which, if believed by the jury, would support a finding that unlawful discrimination was not the cause of Smith's termina tion. Therefore, Ciba has met its burden, and the presumption of discrimination "simply drops out of the picture." *Hicks*, ____U.S. at ____, 113 S.Ct. at 2749. Therefore, the burden shifts to Smith.

C. Smith's Burden

On a motion for summary judgment, this Court must determine whether Smith has provided "factual evidence that would lead a jury to reasonably conclude that [Ciba's] reasons are a pretext for discrimination." *See Bodenheimer*, 5 F.3d at 958 (affirming summary judgment on the ground that pretext was not shown). As noted above, "[a] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, ____U.S. at ____, 113 S.Ct. at 2752 (emphasis in original). Smith offers two grounds showing pretext: (1) that the three people left in his district after his termination were all under forty years old, and (2) Hayes made "repeated remarks' about older people.

Smith's first reason for claiming that Ciba's reason is pretextual is that other employees younger than him remained after he was fired. However, Smith himself admitted that employees who worked under the same supervisors, but were older than Smith, also remained after his termination. *See Smith* depo. at 94-96. The fact that some remaining employees were younger than him, when others were older than him, is not reasonably construable as evidence that Ciba's reasons for terminating Smith were a pretext for discriminating against him on the basis of his age.

Smith's second contention is that Hayes made "repeated remarks about older people." Smith has presented evidence that Hayes made comments that he "did not want any old farts in his district," and complained that Luby's Cafeteria is "like eating at a geriatric ward." Smith gave this deposition testimony when being questioned, not about conduct showing age discrimination, but about conduct which Smith

would describe as "extreme and outrageous." Smith Depo., pp. 24, 78-79. Furthermore, while Smith claims that the passages to which he points describe "repeated comments, "these are the only two instances from which a negative attitude about age could potentially be drawn.[3] And, in fact, there is no evidence that these comments were directed at Smith. The Court is of the opinion that these constitute stray remarks that were not shown to be close to the time when Smith was terminated nor related to Ciba's decision to discharge him. *See Waggoner v. City of Garland,* 987 F.2d 1160, 1166 (5th Cir. 1993) (holding reference to the plaintiff as an "old fart" was a stray remark when made a year before he was fired), *Turner v. North Am. Rubber, Inc.* 979 F.2d 55, 59 (5th Cir. 1992).

None of the evidence provided by Smith suggests that Ciba's reason for terminating him was pretextual. That is, he does not suggest that he was actually fired for any reason other than his failure to complete the tasks assigned to him. Therefore, Smith has not met the first prong of the *St. Mary's Honor Center* definition of pretext: he has not shown that the reason given by Ciba for his termination was false.

Even if he did complete the tasks assigned to him, and if his allegations regarding Hayes' statements are true, they do not show that he was terminated *because* of his age. There is no indication that the statements were made shortly before he was fired. Smith has not shown anything to connect the two events, other than his subjective feeling that he was treated negatively because of his age. Smith's case "ultimately rests on his own subjective belief . . . that [he] has[s] been discriminated against on the basis of age." *Armendartz v. Pinkerton Tobacco Co.,* 58 F.3d 144, 152 (5th Cir. 1995). Such a "subjective belief that [Smith] ha[s] been discriminated against [is not] sufficient to

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3. Even Ciba seems to admit that Smith testified that Hayes made the "geriatric ward" comment on more than one occasion. A close reading of the deposition testimony, however, shows that Smith did not know how many times Hayes made the comment. Smith testified that he went with Hayes to Luby's more than once, not that Hayes made the comment more than once.

create a jury issue as to whether [Ciba's] reason was a pretext for age discrimination." *Id.* at 153. Thus, even if he had shown that Ciba's proffered reason for terminating him was false, he has not shown that discrimination was the real reason for his termination.

In a supplemental response, Smith argues that *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996)(en banc) supports his position that "the plaintiff met his burden by producing evidence that the poor performance reason proffered by the employer as a basis for his discharge was false, and that in fact he was a food[sic] salesman." Smith's statement does not accurately reflect the holding in *Rhodes*. Furthermore, this Court is of the opinion that Smith's portrayal of evidence of "lying" by Ciba is disingenuous.

In *Rhodes*, the Court began by acknowledging that under *Hicks*, the "'factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination.'" *Id.* at 993 (quoting *Hicks*, 113 S.Ct. at 2749). The court then noted that it is "unclear whether the [*Hicks*] Court intended that in all such cases in which an inference of discrimination is *permitted* a verdict of discrimination is *necessarily supported* by sufficient evidence." *Id.* (emphasis added). After reviewing the sufficiency of the evidence standard, the Fifth Circuit recognized that the

> evidence necessary to support an inference of discrimination will vary from case to case. A jury may be able to infer discriminatory intent in an appropriate case from *substantial evidence* that the employer's proffered reasons are false. The evidence may, for example, *strongly indicated that the employer has introduced fabricated justifications* for an employee's discharge, and not otherwise suggest a credible nondiscriminatory explanation.
>
> By contrast, if the evidence put forth by the plaintiff to establish the prima facie case and *to rebut the employer's reasons is not substantial*, a jury cannot reasonably infer discriminatory intent.

Rhodes, 75 F.3d at 994 (emphasis added). This language does not suggest that it is sufficient for the plaintiff to produce evidence that the reason proffered by the employer is false.

More importantly, Smith has not provided "substantial evidence that the employer's proffered reasons are false." The "falsity" to which Smith directs the Court is an apparent contradiction between two Ciba employees regarding who authorized Smith's termination. Likes testified that "Lois Grumet called me and told me . . . that we should go ahead and terminate Paul Smith," but Grumet stated that she "wouldn't have called [Likes] out of the blue, . . . and said fire Paul Smith." Likes depo. p. 257, Grumet depo. p. 181. First, Grumet's answer, when viewed in context of other questioning, indicates that she probably did discuss the termination with Likes, she just does not say it was solely her decision. *See* Grumet depo. p. 180. More importantly, even if these passages showed that either Grumet or Likes falsified testimony (which they do not do), it would not be false testimony regarding the *reason* for Smith's termination. Smith points to Grumet's testimony that Smith could "sell the goods" and that he "knew how to make a presentation and that the doctors liked him." But Grumet admitted that these were *not* the reasons why he was fired; and Ciba never argues that poor sales or poor presentation skills were the motivation for terminating Smith. Smith has produced no evidence, despite his attempts at obfuscation, that Ciba's proferred reason for terminating him, i.e. that he could not keep up with the administrative tasks that were a requirement of his job, was false.

Because there is no genuine issue of material fact showing that the reason Ciba gave fore terminating Smith is false, or that the real reason is age discrimination, Ciba is entitled to judgement as a matter of law.

Disability Discrimination

"A plaintiff may establish a claim of disability discrimination by presenting direct evidence of discrimination. Alternatively, the indirect method of proof set for Title VII actions in *McDonnell Douglas*

[citation omitted] may also be utilized." *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995). To establish a prima facie case, a plaintiff must show that: (1) he suffers from a disability; (2) he is qualified for the job; (3) he was subject to an adverse employment action; and (4) he was replaced by a non-disabled person or was treated less favorably than non-disabled employee. *Id.*

Smith claims that Ciba fired him because of his OCD. In moving for summary judgment, Ciba argues that he is not qualified for the job, and that even if he was, he was not treated less favorably than non-disabled employees. For the purposes of addressing this motion, Ciba concedes the first and third elements of Smith's prima facie case.

Smith correctly notes that determining whether he is qualified for the job involves a two-prong test. First, the Court must determine whether Smith could perform the essential functions of the job; second, if he is not able to perform the essential functions, the Court must determine whether any reasonable accommodation by Ciba would enable him to perform those functions. *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993), *cert. denied*, ____U.S. ____, 114 S.Ct. 1386, 128 L.Ed.2d 61 (1994). Smith has the burden to show that he is qualified for the job. *Id.*

Ciba has provided ample evidence that Smith's performance of his administrative duties gradually deteriorated and appeared to have completely stopped by the time he was terminated. Smith claims that he was not *permanently* disabled. But the question is not whether Smith would even be able to do the job; it is whether he was capable of doing the job at the time of the adverse employment action. At that time, according to Smith's own doctor, his OCD had worsened "to the point of total disability, despite medical treatment." Morrow depo. exh. 1 at 23.

He also seems to argue that his disability did not interfere with the "essential functions of his job." Along these lines, he makes the conclusory statement that "He was a **salesman,** not a **paperpusher!**" Resp. ¶30. He also argues that "Smith's doctor testified that his condi-

tion did not interfere with the essential functions of his job including driving, talking on the telephone, meeting with physicians, and making presentations." However, in the passage to which he refers, Smith's doctor simply stated at OCD did interfere with his paperwork; she did not suggest that other areas of his performance were unaffected. Furthermore, her testimony would not shed light on whether administrative duties are an "essential function" of Smith's job.

Because Smith has not shown that he was able to perform the essential functions, the question becomes whether he has met his burden of showing that unreasonable accommodations by Ciba would have enabled him to perform those functions. Before he was terminated, Smith requested that Ciba re-align its organization such that Smith's Tyler territory would fall under the Dallas district rather than New Orleans.[4] This request was made before Smith had informed Ciba of his OCD, so the request was not made in the context of requesting a reasonable accommodation for his disability in the first place.

But even if it had, this Court is of the opinion that an organizational realignment would not be a reasonable accommodation. Smith requested this realignment for three reasons: to increase his relative[5] sales ranking, thus increasing his evaluation; to reduce his travel time to meetings; and to put him under the supervision of someone other than Hayes. Smith shows no reason why increasing his relative sales ranking, without increasing sales, would improve his ability to perform administrative tasks. He shows no reason why reducing travel time or reporting to a different supervisor would improve his performance, either; he simply argues that these "accommodations" would have improved his chances of overcoming his OCD.

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4. This is the only "accommodation" Smith claims he was denied in his response to the motion for summary judgment. Because he has put forth no evidence that other changes he may have requested constituted "reasonable accommodations," this Court need not address them.

5. Smith admitted that his sales would not increase; he would simply compare more favorably to other sales reps in the Dallas district than in the New Orleans district. Smith depo. pp. 177-78.

The Court is of the opinion that it is unreasonable to require that the entire organizational structure of a sales force be changed to accommodate what amounts to a perceived personality conflict between Smith and Hayes. Because he has not established that he was qualified, with or without reasonable accommodations, Smith has not made a prima facie case for discrimination under the ADA.

Even if he could establish that he was qualified, he fails to present any evidence on the fourth element of a disability discrimination claim. He was not replaced; therefore he must bring forward evidence that he was treated less favorably than non-disabled employees to meet the fourth element. *See Daigle,* 70 F.3d at 396. When Smith was placed on probation, he was required to submit one weekly report that was not required of other people in his position. At the time, Ciba had no reason to know of his OCD. After a few months, and at least six weeks before his termination, this requirement was removed. Other than this brief requirement, therefore, he was not required to do anything that was not required of employees in similar positions. Smith has brought forward no proof that any other Ciba employee who did not suffer from OCD was not terminated after a protracted period of failure to perform required administrative duties. A failure of this element is equally fatal to his prima facie case, and likewise entitles Ciba to summary judgment on Smith's ADA claim

Breach of Contract

The Defendants first argue that Smith does not allege any contract exists between him and the individual defendants, and that he has produced no evidence in support of any such allegation. Smith has produced no summary judgment evidence to contradict this argument. Therefore, The individual defendants are entitled to summary judgment on the breach of contract claim.

Ciba next argues that Smith's claim for breach of an employment contract is barred by the statute of frauds.

> Texas courts continue to follow the historical rule that, absent a specific contract term to the contrary, employment contracts are terminable at will by either party. Therefore, to establish wrongful termination, an employee must first prove that he and his employer had a contract *specifically depriving the employer of the right to terminate the employee at will. An employee must also prove that the contract or agreement was in writing* or, if oral, is enforceable under the statute of frauds.

Zimmerman v. H.E. Butt Grocery Co., 932 F.2d 469, 470 (5th Cir.), cert. denied. ____U.S. ____, 112 S.Ct. 591, 116 L.Ed.2d 615 (1991) (emphasis added).

Smith has produced no evidence that he had a contract in writing with Ciba. Instead, he argues that his employment contract does not fall under the statute of frauds. He claims that because he could quit or be fired "at any time," the employment contract was not for a definite period. His argument continues that a contract that is for an indefinite period is performable within one year, and therefore does not fall within the statute of frauds. Because the contract does not fall within the statute of frauds, Smith argues that the contract is enforceable.

Smith cites *Miller v. Riata Cadillac Co.*, 517 S.W.2d 773, 775 (Tex. 1975) for the proposition that an employment contract for an indefinite term is performable within one year, and therefore does not fall within the statute of frauds. While this proposition is correct, his argument proves too much. His argument, reduced to its essentials, is that because he has a contract for employment at will, he is not subject to the employment at will doctrine. The problem is that in arguing that a contract exists, he admits that the contract (assuming it exists) *does not* "specifically depriv[e] the employer of the right to terminate the employee at will." *See Zimmerman*, 932 F.2d at 470. Therefore, he cannot claim that his termination was a breach of any contract and Ciba is entitled to judgment as a matter of law.

Conclusion

Smith has brought forward no evidence that Ciba's conduct in this case was extreme and outrageous. Ciba has stated a legitimate, non-discriminatory reason for terminating him, based upon his failure to perform essential administrative functions of his job. Smith has not raised a genuine issue of material fact suggesting that Ciba's reason is a pretext for age discrimination. Furthermore, he has not stated a prima facie case for disability discrimination because he has not shown that he was qualified for his job, or that he was treated less favorably than non-disabled employees. Because he did not have a contract specifically depriving Ciba of the right to terminate him at will, he has not breach of contract claim based upon his termination. For these reasons, Ciba's motion for summary judgment (docket #22) is GRANTED, and this case shall be DISMISSED.

So ORDERED.

The clerk shall enter this order and provide a true copy to all parties.

SIGNED this 22nd day of May, 1996.

/s/John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED
U.S. COURT OF APPEALS
APR 30 1997
CHARLES R. FULBRUGE III CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20609

PAUL R. SMITH,

Plaintiff-Appellant,

v.

CIBA-GEIGY CORPORATION; JOHN K. LIKES;
and JAMES M. HAYES,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas, Houston

ORDER:

IT IS ORDERED that the unopposed motion of appellant for leave to file petition for rehearing out of time is GRANTED.

/s/FORTUNATO P. BENEVIDES
FORTUNATO P. BENEVIDES
UNITED STATES CIRCUIT JUDGE

APPENDIX E

FILED
U.S. COURT OF APPEALS
MAY 15 1997
CHARLES R. FULBRUGE III CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20609

PAUL R. SMITH,

Plaintiff-Appellant,

v.

CIBA-GEIGY CORPORATION; JOHN K. LIKES; and JAMES M. HAYES,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING

Before REAVLEY, JOLLY and BENEVIDES, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:
/s/illegible
United States Circuit Judge

Clerk's Note: See FRAP and local rules 41 for stay of the mandate.

APPENDIX F

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic, assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals, with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub.L. 101-336, § 2, July 26, 1990, 104 Stat. 328.)

* * * * *

§ 12102. Definitions

A used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services: includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability' means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or
(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(Pub.L. 101-336, § 3, July 26, 1990, 104 Stat. 329.)

* * * * *

§ 12111. Definitions

As used in this subchapter:

(1) Commission
The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity
The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat
The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee
The term "employee" means an individual employed by an employer. With respect to employment in a foreign country,

such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bonafide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug means a controlled substance, as defined in schedules 1 through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc.

The terms "person", "labor organization", employment agency", "commerce", and "industry affection commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would im-

pose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(Pub.L. 101-336. Title I, § 101, July 26, 1990, 104 Stat. 330; Pub.L. 102-166, Title l, § 109(a), Nov. 21, 1991, 105 Stat. 1077.)

* * * * *

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) **(A)** not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country is compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation
(A) Presumption
If an employer controls a corporation whose place of incorpo-

ration is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(c) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of each examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at

that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Pub.L. 101-336, Title I, § 102, July 26, 1990, 104 Stat. 331; Pub.L. 102-166, Title I, § 109(b)(2), Nov. 21, 1991, 105 Stat. 1077.)

CROSS REFERENCES

Architect of the Capitol Human Resources Program discriminatory practices prohibited, see 40 USCA § 166b-7.

Damages in cases of intentional discrimination in employment, see 42 USCA § 1981a.

* * * * *

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 25, 1990 shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

(Pub.L. 101-336, Title 1, § 103, July 26, 1990, 104 Stat. 333.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. House Report No. 101-485(Parts I-IV), House Conference Report No. 101-596, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 267.

Effective Dates

1990 Acts. Section effective 24 months after July 26, 1990, see section 108 of Pub.L. 101-336, set out as a note under section 12111 of this title.

CROSS REFERENCES

Architect of the Capitol Human Resources Program discriminatory practices prohibited, see 40 USCA § 166b-7.

LIBRARY REFERENCES

American Digest System

Action for employment discrimination against handicapped person; defenses, see Civil Rights —210.

Encyclopedias

Action for employment discrimination against handicapped person; defenses, see C.J.S. Civil Rights § 235.

Law Reviews

AIDS in the food industry. Rebecca Winterscheidt, 28 Ariz.Atty. 13 (Mar. 1992).

AIDS-phobia claims and the Disabilities Act. Leo T. Crowley, 212 N.Y.L.J. 3 Oct. 20, 1994).

Americans with Disabilities Act as it relates to AIDS in the workplace. Vimal K. Shah, 6 CBA Rec. 33 (Nov. 1992).

An employer's guide to the Americans with Disabilities Act: From job qualifications to reasonable accommodations. Lawrence P. Postol and David D. Kadue, 24 J. Marshall L. Rev. 693 (1991).

Reasonable accommodation under the Americans with Disabilities Act: The limitations of Rehabilitation Act precedent. Barbara A. Lee, 14 Berkeley J. of Empl. & Lab.L. 201 (1993).

* * * * *

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing is subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is not longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging is such use;

except that it shall not be a violation of this chapter for a covered

entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the

regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For the purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

(Pub.L. 101-336, Title I, § 104, July 26, 1990, 104 Stat. 334.)

* * * * *

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner

prescribed by section 2000e-10 of this title.

(PubL. 101-336, Title I, § 105, July 26, 1990, 104 Stat. 336.)

* * * * *

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of Title 5.

(Pub.L. 101-336, Title I, § 106, July 26, 1990, 104 Stat. 336.)

* * * * *

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12166 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 702 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under

this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 15, 1981 (46 Fed.Reg. 7435, January 23, 1981) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

(PubL. 101-336, Title 1, § 107, July 26, 1990, 104 Stat. 336.)

* * * * *

APPENDIX G

29 C.F.R. §1630.9(a)-(a) It is unlawful for a covered entity not to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.